

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES EARL HARVEY, aka Abdul O No C-08-2894 VRW (PR)
Shakur,

Plaintiff,

v

ORDER OF SERVICE

J PUENTE, et al,

Defendant(s).

I

Plaintiff, a prisoner at Pelican Bay State Prison ("PBSP"), has filed a pro se first amended complaint under 42 USC section 1983 alleging eleven First Amendment claims. Specifically, plaintiff alleges that PBSP officials: refused to process outgoing mail with his Muslim name by confiscating approximately sixteen letters over a two month period (claim one); repeatedly confiscated his mail, writings and other written materials under the false pretext of being gang-related (claims two through seven); refused to allow him either to send mail to or receive mail for a period of two years from addresses PBSP officials identified as "drop boxes for a

1 prison gang" (claim eight); refused to deliver three individual
2 writs to the Ninth Circuit (claim nine); intentionally destroyed an
3 appeal filed pursuant to the inmate administrative grievance system
4 (claim ten); and intentionally misdirected a piece of his mail to
5 the New York office of the district attorney (claim eleven). Doc #9
6 at 4-7. Plaintiff seeks damages.

8 II

9 Federal courts must engage in a preliminary screening of
10 cases in which prisoners seek redress from a governmental entity or
11 officer or employee of a governmental entity. 28 USC § 1915A(a).
12 The court must identify cognizable claims or dismiss the complaint,
13 or any portion of the complaint, if the complaint "is frivolous,
14 malicious, or fails to state a claim upon which relief may be
15 granted," or "seeks monetary relief from a defendant who is immune
16 from such relief." Id § 1915A(b). Pleadings filed by pro se
17 litigants, however, must be liberally construed. Balistreri v
18 Pacifica Police Dep't, 901 F2d 696, 699 (9th Cir 1990).

19 To state a claim under 42 USC section 1983, a plaintiff
20 must allege two essential elements: (1) that a right secured by the
21 Constitution or laws of the United States was violated, and (2) that
22 the alleged violation was committed by a person acting under the
23 color of state law. West v Atkins, 487 US 42, 48 (1988).

25 A

26 In claim ten, plaintiff alleges that PBSP officials
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1 violated his constitutional rights when they intentionally destroyed
2 an appeal he filed pursuant to the inmate administrative grievance
3 system. It is well-established that there is no constitutional
4 right to a prison administrative appeal or grievance system, see
5 Ramirez v Galaza, 334 F3d 850, 860 (9th Cir 2003); Mann v Adams, 855
6 F2d 639, 640 (9th Cir 1988), and that a state's creation of a prison
7 administrative appeal or grievance system does not implicate a
8 liberty interest protected by the Due Process Clause, see Antonelli
9 v Sheahan, 81 F3d 1422, 1430 (7th Cir 1996); Buckley v Barlow, 997
10 F2d 494, 495 (8th Cir 1993) (same). Plaintiff's allegations set
11 forth in claim ten regarding PBSP officials' intentional destruction
12 of an appeal he filed pursuant to the inmate administrative
13 grievance system fail to state a claim under section 1983 and that
14 claim is DISMISSED. See id.

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16 B

17 In claims one through nine and eleven, plaintiff alleges
18 that PBSP officials violated his constitutional rights by
19 interfering with his mail delivery service. Prisoners enjoy a First
20 Amendment right to send and receive mail. See Witherow v Paff, 52
21 F3d 264, 265 (9th Cir 1995) (citing Thornburgh v Abbott, 490 US 401,
22 407 (1989)). A prison, however, may adopt regulations or practices
23 which impinge on a prisoner's First Amendment rights as long as the
24 regulations are "reasonably related to legitimate penological
25 interests." See Turner v Safley, 482 US 78, 89 (1987). The Turner
26 standard applies to regulations and practices concerning all
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1 correspondence between prisoners and to regulations concerning
2 incoming mail received by prisoners from non-prisoners. See
3 Thornburgh, 490 US at 413.

4 In the case of outgoing correspondence from prisoners to
5 non-prisoners, however, an exception to the Turner standard applies.
6 Because outgoing correspondence from prisoners does not, by its very
7 nature, pose a serious threat to internal prison order and security,
8 there must be a closer fit between any regulation or practice
9 affecting such correspondence and the purpose it purports to serve.
10 See Thornburgh, 490 US at 411-12. Censorship in such instances is
11 justified only if: (1) the regulation or practice in question
12 furthers one or more of the substantial governmental interests of
13 security, order and rehabilitation; and (2) the limitation on First
14 Amendment freedoms is no greater than necessary to further the
15 particular government interest involved. See Procunier v Martinez,
16 416 US 396, 413 (1974), overruled on other grounds, Thornburgh v
17 Abbott, 490 US 401, 413-14 (1989); see, for example, Witherow, 52
18 F3d at 265-66 (regulation requiring visual inspection of outgoing
19 mail from inmates to certain public officials *closely* related to
20 legitimate penological interest of preventing prisoners from
21 disseminating harmful or offensive materials and avoids unnecessary
22 intrusion) (emphasis added).

23 A district court reviewing whether a prisoner states a
24 claim for the censorship of outgoing mail should not decide, on the
25 pleadings, whether the alleged censorship is justified. See Barrett
26 v Belleque, 544 F3d 1060, 1062 (9th Cir 2008) (per curiam) (holding
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1 district court erred by dismissing complaint for failure to state a
2 claim by deciding on the pleadings that censorship was justified).
3 A prisoner complaint that unequivocally pleads facts alleging that
4 prison officials censored his outgoing mail and punished him for its
5 contents states a claim that is clearly cognizable under Procunier.
6 Id.

7 The allegations set forth in claim nine regarding PBSP
8 officials' failure to deliver three individual writ petitions to the
9 Ninth Circuit also implicate plaintiff's constitutional right of
10 access to the courts. See Lewis v Casey, 518 US 343, 350 (1996);
11 Bounds v Smith, 430 US 817, 821 (1977). To establish a claim for
12 any violation of the right of access to the courts, plaintiff must
13 prove that there was an inadequacy in the prison's legal access
14 program that caused him an actual injury. See Lewis, 518 US at
15 350-55. To prove an actual injury, plaintiff must show that the
16 inadequacy in the prison's program hindered his efforts to pursue a
17 non-frivolous claim concerning his conviction or conditions of
18 confinement. See id at 354-55.

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20 C

21 Liberally construed, plaintiff's allegations as to claims
22 one through nine and eleven appear to state cognizable First
23 Amendment claims under section 1983 and PBSP officials J Puente,
24 Captain K Brandon, B Thornton, D E Milligan, Lieutenant Perry,
25 Sergeant G. Stewart, D T Hawkes and Officer Beeson of the
26 Institutional Gang Investigation Unit; Captains Kays and Yax of the
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1 Investigation Services Unit; D Beard of the Security Squad; [First
2 Name Unknown] Murphy of the Office of Correctional Safety; and Law
3 Library Officer Murray will be served. Claim ten is DISMISSED under
4 the authority of 28 USC section 1915A(b).

5 California Department of Corrections and Rehabilitation
6 former directors C Terhune and M Cate, wardens Robert Horel, Joe
7 McGrath and R. Kirkland, and associate warden Dillard are DISMISSED
8 as defendants under the authority of 28 USC section 1915A(b) because
9 they are sued only in their capacity as supervisors. It is
10 well-established that there is no respondeat superior liability
11 under section 1983, ie, there is no liability simply because one is
12 responsible for the actions or omissions of another. See Taylor v
13 List, 880 F2d 1040, 1045 (9th Cir 1989).

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15 III

16 For the foregoing reasons and for good cause shown:

17 1. The clerk shall issue summons and the United States
18 Marshal shall serve, without prepayment of fees, copies of: (1) the
19 first amended complaint in this matter and all attachments thereto
20 (Doc #9); (2) all exhibits attached to Doc ## 1, 4, 5, 6 and 11,
21 which are copies of the appeals filed pursuant to the inmate
22 administrative grievance system that are related to plaintiff's
23 claims; and (3) copies of this order on PBSP officials J Puente,
24 Captain K Brandon, B Thornton, D E Milligan, Lieutenant Perry,
25 Sergeant G. Stewart, D T Hawkes and Officer Beeson of the
26 Institutional Gang Investigation Unit; Captains Kays and Yax of the
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1 Investigation Services Unit; D Beard of the Security Squad; A Murphy
2 of the Office of Correctional Safety; and Law Library Officer
3 Murray. All other named defendants are DISMISSED. The clerk also
4 shall serve a copy of this order on plaintiff.

5 2. In order to expedite the resolution of this case, the
6 court orders as follows:

7 a. No later than 90 days from the date of this
8 order, defendants shall file a motion for summary judgment or other
9 dispositive motion. A motion for summary judgment shall be
10 supported by adequate factual documentation and shall conform in all
11 respects to Federal Rule of Civil Procedure 56, and shall include as
12 exhibits all records and incident reports stemming from the events
13 at issue. If defendants are of the opinion that this case cannot be
14 resolved by summary judgment or other dispositive motion, they shall
15 so inform the court prior to the date their motion is due. All
16 papers filed with the court shall be served promptly on plaintiff.

17 b. Plaintiff's opposition to the dispositive motion
18 shall be filed with the court and served upon defendants no later
19 than 30 days after defendants serve plaintiff with the motion.

20 c. Plaintiff is advised that a motion for summary
21 judgment under Rule 56 of the Federal Rules of Civil Procedure will,
22 if granted, end your case. Rule 56 tells you what you must do in
23 order to oppose a motion for summary judgment. Generally, summary
24 judgment must be granted when there is no genuine issue of material
25 fact - that is, if there is no real dispute about any fact that
26 would affect the result of your case, the party who asked for
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1 summary judgment is entitled to judgment as a matter of law, which
2 will end your case. When a party you are suing makes a motion for
3 summary judgment that is properly supported by declarations (or
4 other sworn testimony), you cannot simply rely on what your
5 complaint says. Instead, you must set out specific facts in
6 declarations, depositions, answers to interrogatories, or
7 authenticated documents, as provided in Rule 56(e), that contradicts
8 the facts shown in the defendant's declarations and documents and
9 show that there is a genuine issue of material fact for trial. If
10 you do not submit your own evidence in opposition, summary judgment,
11 if appropriate, may be entered against you. If summary judgment is
12 granted, your case will be dismissed and there will be no trial.
13 Rand v Rowland, 154 F3d 952, 962-63 (9th Cir 1998) (en banc) (App
14 A).

15 Plaintiff also is advised that a motion to dismiss for
16 failure to exhaust administrative remedies under 42 USC section
17 1997e(a) will, if granted, end your case, albeit without prejudice.
18 You must "develop a record" and present it in your opposition in
19 order to dispute any "factual record" presented by the defendants in
20 their motion to dismiss. Wyatt v Terhune, 315 F3d 1108, 1120 n14
21 (9th Cir 2003).

22 d. Defendants shall file a reply brief within 15
23 days of the date on which plaintiff serves them with the opposition.

24 e. The motion shall be deemed submitted as of the
25 date the reply brief is due. No hearing will be held on the motion
26 unless the court so orders at a later date.

4. All communications by plaintiff with the court must be served on defendants, or defendant's counsel once counsel has been designated, by mailing a true copy of the document to defendants or defendant's counsel.

IT IS SO ORDERED.

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